DIAL KAUR TARA SINGH

v.

MANN FOONG REALTY SDN BHD

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
ABDUL MALEK AHMAD JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NOS: A-02-28-1997,
A-03-45-1997 & A-03-54-1997]
20 MARCH 2000

CIVIL PROCEDURE: *Summons for direction - Delay in taking out summons for direction - After pleadings deemed closed - Defendant applied to dismiss action before plaintiff took out summons for direction - Which application takes priority - Rules of the High Court 1980, O. 25 r. 1(1),(4) & (5)*

CONTRACT: *Formation - Reciprocal promises - Nature of term - Determination of - Primary obligation and subsidiary term - Performance of - Non-performance of primary obligation - Whether non-performance of subsidiary term relieve plaintiff from primary obligation - Whether plaintiff could claim specific performance of subsidiary term - Contracts Act 1950, s. 55*

The plaintiff's action was for specific performance of an agreement made between the plaintiff and the defendant, in particular, the defendant's promise in para (c) of the contract agreement, *ie*, to execute the transfer of eight pieces of land ('the land') named in the agreement to the plaintiff. The plaintiff obtained an interlocutory injunction restraining the defendant from disposing of or dealing with the land. The defendant appealed against the order (1st appeal). Apart from the 1st appeal, the defendant also filed two other appeals, *ie*, (i) appeal against the decision of the deputy registrar granting order in terms for the plaintiff's summons for direction which was filed 53 days after the pleadings were deemed closed (2nd appeal) and (ii) appeal against the decision of the deputy registrar dismissing the defendant's application to dismiss the plaintiff's action (3rd appeal).

Held:
Per NH Chan JCA

[1] As paras (c) and (d) of the agreement were reciprocal promises. The performance by the defendant of the promise in para (c) which was a subsidiary term, could not be claimed by the plaintiff till the plaintiff's

own promise in para (d) which was a primary obligation had been performed. Therefore, the non-performance of the plaintiff's promise to pay the bank in full and to recover all the 31 titles from the bank was fatal. Henceforth, if the plaintiff failed to perform its primary obligation in para (d), it could not claim the performance of the reciprocal promise by the defendant in para (c).

[2] Since the plaintiff had no cause of action against the defendant, there was no legal basis for the interlocutory injunction to be granted or for it to be continued.

[3] As the plaintiff did not take out a summons for directions within one month as stipulated in O. 25 r. 1(1) Rules of the High Court 1980 (RHC) and since the defendant had already applied under O. 25 r. 1(4) RHC to dismiss the action before the plaintiff could take out any summons for directions, the court below ought to have dismissed the plaintiff's summons for directions or made no order on it and heard the defendant's application to dismiss the action instead.

[4] The defendant's application to dismiss the plaintiff's action should not have been dismissed in preference to making an order for the plaintiff's summons for direction which was not taken out within time. The 3rd appeal therefore must be allowed. However, as the plaintiff's action was unsustainable, it was futile and a waste of time to deal with the defendant's application as if it was a summons for directions under O. 25 r. 1(5) RHC. It was more appropriate, in the circumstances of the case to dismiss the action.

[Appeals allowed, interlocutory injunction set aside.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Tindakan plaintif adalah untuk perlaksanaan spesifik satu perjanjian yang dibuat antara plaintif dan defendan, terutamanya, janji defendan dalam perenggan (c) perjanjian kontrak tersebut, iaitu, melaksanakan pindahmilik lapan bidang tanah ('tanah tersebut') yang telah dinamakan di dalam perjanjian tersebut kepada plaintif. Plaintif telah mendapat satu injunksi interlokutori menghalang defendan dari melupuskan atau berurusan dengan tanah tersebut. Defendan merayu terhadap perintah tersebut (rayuan pertama). Selain dari rayuan pertama tersebut, defendan juga memfailkan dua lagi rayuan, iaitu, (i) rayuan terhadap keputusan penolong pendaftar memberikan perintah seperti yang dipohon didalam saman untuk arahan yang difailkan oleh plaintif selepas 53 hari pliding disifatkan tutup (rayuan kedua) dan (ii) rayuan terhadap keputusan penolong pendaftar menolak permohonan defendan untuk mengenepikan tindakan plaintif (rayuan ketiga).

Diputuskan:
Oleh NH Chan HMR

[1] Oleh kerana perenggan (c) dan (d) perjanjian tersebut adalah janji-janji bersaling. Perlaksanaan oleh defendan janji di perenggan (c) yang mana merupakan satu terma subsidiari, tidak dapat dituntut oleh plaintif sehinggalah plaintif melaksanakan obligasinya yang merupakan satu obligasi primer. Dari itu, ketidaklaksanaan janji plaintif membayar penuh kepada bank dan memperolehi semula kesemua 31 hakmilik dari bank adalah memudaratkan. Oleh yang demikian, jika plaintif gagal melaksanakan obligasi primernya di perenggan (d), ia tidak dapat menuntut perlaksanaan janji bersaling defendan diperenggan (c).

[2] Oleh kerana plaintif tidak mempunyai kausa tindakan terhadap defendan, tidak terdapat asas undang-undang untuk membenarkan injunksi interlokutori ataupun meneruskannya.

[3] Memandangkan plaintif tidak mengeluarkan saman untuk arahan dalam masa sebulan sebagaimana yang diperuntukkan di bawah A. 25 k. 1(1) Kaedah-kaedah Mahkamah Tinggi 1980 (KMT) dan oleh kerana defendan telah memohon dibawah A. 25 k. 1(4) KMT untuk menolak tindakan ini sebelum plaintif sempat mengeluarkan saman untuk arahan, mahkamah di bawah sepatutnya menolak saman untuk arahan plaintif atau tidak membuat sebarang perintah mengenainya dan sebaliknya mendengar permohonan defendan untuk menolak tindakan ini.

[4] Permohonan defendan untuk menolak tindakan plaintif tidak wajar ditolak kerana mengutamakan saman untuk arahan plaintif yang dikeluarkan tidak dalam tempoh masanya. Dengan itu rayuan ketiga mestilah dibenarkan. Namun begitu, memandangkan tindakan plaintif sukar untuk dipertahankan, ianya adalah sia-sia dan membazir masa untuk mendengar permohonan defendan seolah-olah ianya satu saman untuk arahan dibawah A. 25 k. 1(5) MKT. Adalah lebih wajar dalam keadaan kes ini untuk menolak tindakan ini.

[Rayuan-rayuan ditolak; injunksi interlokutori diketepikan.]

Case(s) referred to:
Ching Yik Development Sdn Bhd v. Setapak Height Development Sdn Bhd [1997] 1 AMR 89 ***(foll)***
Government of Malaysia v. Lim Kit Siang [1988] 2 MLJ 12 ***(refd)***
Keet Gerald Francis Noel John v. Mohd Noor [1995] 1 MLJ 193 ***(refd)***
Siskina (Cargo Owners) v. Distos SA [1977] 3 WLR 818 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 55
Rules of the High Court 1980, O. 25 r. 1(1), (4), (5)

For the appellant - Hira Singh; M/s Asbir, Hira Singh & Co
For the respondent - SY Lee; M/s Mohd Noor & SY Lee

[Appeal from High Court, Ipoh; Civil Suit No: 22-137-1996]

Reported by Izzaty Izzuddin

JUDGMENT

NH Chan JCA:

These are three appeals by the same appellant (Dial Kaur) with the same respondent (Mann Foong Realty Sdn Bhd). The appellant was the defendant and the respondent was the plaintiff in the proceedings instituted by the plaintiff for specific performance of an agreement in writing contained in a letter from the solicitors for the plaintiff (M/s Mohd Noor & SY Lee) to the solicitors for the defendant (M/s Asbir, Hira Singh & Co). We have allowed all three appeals and we give our reasons below. We will deal with the three appeals separately.

Civil Appeal No A-02-28 Of 1997

The plaintiff's action is for specific performance of an agreement made between the plaintiff and the defendant in exchange of correspondence between their solicitors which culminated in an agreement the terms of which were contained in the following letter.

This is the plaintiff's solicitors' letter to the defendant's solicitors:

MOHD NOOR & S.Y. LEE

Your Ref : HS/2645/slc

Our Ref : LSY/M4849/89BC 27th July 1995

Messrs Asbir, Hira Singh & Co.
Advocates & Solicitors
No. 6, Jalan Maharaja Lela,
(Station Road)
30000 Ipoh. **BY HAND**

Dear Sirs,

Re: Ipoh High Court Suits Nos. 22-210-89 and 22-208-89
Dial Kaur a/p Tara Singh v. Mann Foong Realty Sdn Bhd

With reference to the telephone conversation between your Mr Hira Singh and our Mr S.Y. Lee, we confirm that the terms of settlement are as follows:

a) Our clients are to pay your client the sum of RM23,000.00;

b) Our client will settle all outstanding quit rent and assessment payable in respect of the 54 lots involved up to date hereof;

c) Your client is to execute the eight (8) transfers of the land known as Lot Nos. 655, 656, 658, 659, 660, 661, 662 and 663 together with the PDS 15 and the CKHT 1 to our clients or their nominees.

d) Our client will settle the RM1,186,640.00 due to Malayan Banking Berhad to redeem *(sic)* the 8 titles of our client and your client's 23 titles;

e) The Guarantors in the agreement dated 19th March 1984 are released;

f) The above two cases are to be withdrawn with no order as to costs;

g) There be no further claim by either party against the other.

Yours faithfully,

Sgd

c.c. client

The plaintiff's claim in the action is for the defendant to perform her promise in para (c) of the above agreement, which is for the defendant to execute the transfer of the eight titles named in the paragraph to the plaintiff. In the court of first instance the plaintiff had applied for and obtained an interlocutory injunction restraining the defendant from disposing of or dealing with the land described in the eight titles. The defendant appeals to the Court of Appeal against this order granting the injunction.

We are of the view that the real issue before us is quite straightforward. It is simply a matter of construing the effect of these two paragraphs, namely, (c) and (d) in the agreement. For convenience we have reproduced the two paragraphs below:

c) Your client is to execute the eight (8) transfers of the land known as Lot Nos. 655, 656, 658, 659, 660, 661, 662 and 663 together with the PDS 15 and the CKHT 1 to our clients or their nominees.

d) Our client will settle the RM1,186,640.00 due to Malayan Banking Berhad to redeem the 8 titles of our client and your client's 23 titles;

In this respect s. 55 of the Contracts Act 1950 applies. It reads:

55 When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and if the promisor of the promise last mentioned fails to perform it, the promisor cannot claim the performance of the reciprocal

> promise, and must make compensation to the other party to the contract for any loss which the other party may sustain by the non-performance of the contract.

This is a case where there were reciprocal promises to be performed by the two parties such that the performance of the promise by one party could not be claimed by the other till the other party's own promise had been performed. In this case the reciprocal promises in the agreement consisted of paras (c) and (d) such that the performance of the promise in para (c) by the defendant could not be claimed by the plaintiff till the plaintiff's own promise in para (d) had been performed. And if the plaintiff failed to perform its promise in para (d) it could not claim the performance of the reciprocal promise by the defendant in para (c). Here we know that the plaintiff had to perform its promise in para (d) first before it could call upon the defendant to perform her promise in para (c) because in para (d) the plaintiff had to pay Malayan Banking Bhd RM1,186,640 in order to obtain the release of the said eight titles and the defendant's 23 titles from the bank. [Paragraph (d) uses the word "redeem" in the phrase "to redeem the 8 titles of our client and your client's 23 titles". I pause here to interpolate that it is wrong to use the word "redeem" with reference to the National Land Code. A mortgage of land involves a conveyance of the land from the mortgagor to the mortgagee so that the mortgagor can redeem his land by a re-conveyance of it to him from the mortgagee upon repayment of the loan (this, in English law, is called the equity of redemption). On the other hand, a charge under the National Land Code does not involve any transfer of the land at all.

The proprietorship of the land remains all the time with the chargor (owner). A charge is a registered interest in land that is charged to the creditor (chargee) as security for a loan. When the loan is repaid the charge can be discharged]. In *Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd* [1997] 1 AMR 89 Gopal Sri Ram JCA said, at 98:

> Another approach to the problem is cases that involve synallagmatic contracts is to look at the consequences of the breach of the term in question. If the breach is of such a nature that it goes to the root of the contract, then the term broken is fundamental in nature. On the other hand, if the consequences of the breach complained of are not serious in the sense that they do not go to the root of the contract, then the term in question is a subsidiary one ... .

And at 99, 100 he said this:

> ... It is not difficult to recognise that, having regard to the terms of the first sale agreement as a whole, the stipulation as to the payment of the purchase price is a fundamental term. Equally it is plain that the obligation

> to deliver the executed instrument of transfer is merely a subsidiary term, the non-performance of which does not relieve the appellant from his obligations under the contract. The learned Judicial Commissioner, therefore, rightly gave effect to the principles that govern this case and held the appellant's failure to pay the purchase price to be fatal to its case.
>
> There is no doubt, as was repeatedly pointed out to counsel in the course of his argument, that the result may well have been different if ... the obligation on the part of his client to pay the purchase price had been made conditional upon the delivery-up by the respondent of the memorandum of transfer. But that is not the case here.

Applying the above reasoning to the present case, it is plain that the obligation of the defendant under para (c) to execute the eight transfers of the land in question to the plaintiff is merely a subsidiary term, the non-performance of which does not relieve the plaintiff from his primary obligation under para (d) of the contract. The obligation of the plaintiff under para (d) to pay RM1,186,640 to Malayan Banking to settle the debt due to the bank so as to obtain the release of all the 31 titles from the bank and to have the charge discharged is a fundamental term. It is plain, therefore, that the promise of the defendant to execute the eight transfers in para (c) could not be claimed by the plaintiff till the plaintiff's own promise in para (d) had been performed. In our judgment the non-performance of the plaintiff's promise to pay the bank in full and to recover all the 31 titles from the bank is fatal to its case. If the plaintiff failed to perform its promise in para (d), it could not claim the performance of the reciprocal promise by the defendant in para (c): see s. 55, Contracts Act 1950. If the plaintiff was not entitled to make such a claim against the defendant till its own obligation in para (d) had been performed then his action against the defendant must surely fail. Since the plaintiff had no cause of action against the defendant in its statement of claim, there was no legal basis for the interlocutory injunction to be granted or for it to be continued. Without a cause of action, no serious question for trial was disclosed to sustain the injunction that was obtained against the defendant: see *Keet Gerald Francis Noel John v. Mohd Noor* [1995] 1 MLJ 193, CA. This is how Gopal Sri Ram put it, at 206, 207:

> To summarize, a Judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines:
>
> (1) he must ask himself whether the totality of the facts presented before him discloses a *bona fide* serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient

> if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. **If** he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that **no serious question is disclosed, that is the end of the matter and the relief is refused**. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry; (emphasis added)

See *Siskina (Cargo Owners) v. Distos S.A.* [1977] 3 WLR 818, HL(E) where Lord Diplock said this at 825:

> A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependant upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action.

And see also *Government of Malaysia v. Lim Kit Siang* [1988] 2 MLJ 12, 19 where Salleh Abas LP said:

> Since the suit against UEM [United Engineers (M) Berhad] is not maintainable, there is therefore no question of the respondent's entitlement to a remedy of declaration and injunction, permanent or other wise. The interim injunction which was granted against UEM has no legal basis.

We have therefore allowed the appeal and dissolved the injunction.

For completeness some background information here may not be amiss. On 18 August 1995 the plaintiff's solicitors paid to Malayan Banking Bhd two cheques for the total sum of RM900,000 to obtain the release of the 23 titles that belonged to the defendant. The bank handed these 23 titles to the plaintiff's solicitors for the purpose of discharging the charge on them. The plaintiff later on 24 August 1995 paid a further sum of RM274,640 in the hope that that would be sufficient to discharge the charge on all the 31 titles (8+23). But the bank insisted that a sum of RM136,166.89 was still due to the bank and refused to release the remaining 8 titles. Plainly the plaintiff had not performed its obligation to obtain all the 31 titles because it failed to pay the sum demanded by the bank. It managed to get from the bank only the 23 titles which belonged to the defendant and which it kept.

These 31 titles had been charged to the bank by the defendant as security for the repayment of a loan to the plaintiff from the bank to finance the development of the land as a housing estate under the parties' joint venture

agreement. As the plaintiff had failed to repay the bank the loan, the bank had applied to the High Court at Ipoh (Originating Summons 24-905-1989) for an order for sale of all the charged lands against the defendant as chargor. The bank obtained an order for sale of all the 31 plots of land on 11 January 1992. But before the land could be sold by public auction, the parties entered into the above agreement. As the bank was demanding to be paid the amount still owing to the bank and in order to prevent the remaining 8 plots from being sold by public auction the defendant was compelled to pay off the bank with the sum of RM146,841 to discharge the charge on the 8 plots. Upon receiving the payment, the bank handed the 8 titles to her. Just as the plaintiff has kept the 23 titles that are the defendant's, the defendant has also kept the 8 titles that would have been the entitlement of the plaintiff had the contract been performed.

We have allowed the appeal with costs here and in the court below and set aside the interlocutory injunction.

Civil Appeal No A-03-45 Of 1997

This appeal concerns the plaintiff's application in a summons for directions under O. 25 r. 1(1) of the Rules of the High Court 1980 (RHC). A plaintiff must take out a summons for directions within one month after the pleadings in the action are deemed to be closed. Order 25 r. 1(1) is as follows:

> 1(1) With a view to providing, in every action to which this rule applies, an occasion for the consideration by the Court of the preparations for the trial of the action, so that ...
>
> (a) all matters which must or can be dealt with on interlocutory applications and have not already been dealt with may so far as possible be dealt with; and
>
> (b) such directions may be given as to the future course of the action as appear best adapted to secure the just, expeditious and economical disposal thereof,
>
> **the plaintiff must, within one month after the pleadings in the action are deemed to be closed, take out a summons in Form 46** (in these rules referred to as a summons for directions) returnable in not less than 14 days. (emphasis added)

Here, in the present case, the plaintiff did not take out a summons for directions until 53 days after pleadings were deemed to be closed. But before the plaintiff could take out any summons for directions, the defendant had filed a summons in chambers to dismiss the action. If the plaintiff did not take out a summons for direction within one month after

the close of pleadings in accordance with r. 1(1), r. 1(4) would have entitled the defendant either to take out a summons for directions or to apply for an order to dismiss the action. This is what O. 25 r. 1(4) says:

> 1(4) If the plaintiff does not take out a summons for directions in accordance with the foregoing provisions of this rule, **the defendant or any defendant may do so or apply for an order to dismiss the action**. (emphasis added)

Faced with the two applications, *ie*, the summons in chambers by the defendant to dismiss the action (O. 25 r. 1(4)) which was filed earlier and the summons for directions by the plaintiff under O. 25 r. 1(1) which was taken out later, the deputy registrar granted the plaintiff's application for directions instead. The defendant's appeal against this order which was affirmed by the judge below is the instant appeal. The registrar also dismissed the defendant's application to dismiss the action which was also affirmed by the judge (this is the next appeal).

Since the plaintiff did not take out a summons for directions within the time of one month as stipulated in r. 1(1) and since the defendant had already applied under r. 1(4) to dismiss the action before the plaintiff could take out any summons for directions, the court below ought to have dismissed the plaintiff's summons for directions or made no order on it and heard the defendant's summons to dismiss the action under r. 1(4). The plaintiff's application for directions which was not taken out within time should give way to the defendant's application to dismiss the action as provided for in O. 25 r. 1(4). It is only when the court is dealing with the defendant's summons under r. 1(4) to dismiss the action that the court has discretion either to dismiss the action or to deal with the defendant's application as if it were a summons for directions (see r. 1(5)). Order 25 r. 1(5) reads as follows:

> 1(5) On an application by a defendant to dismiss the action under paragraph (4) the Court may either dismiss the action on such terms as may be just or deal with the application as if it were a summons for directions.

Rule 1(4) allows the defendant either to take out a summons for directions or to apply for an order dismissing the action if the plaintiff does not take out a summons for directions in time. But if the defendant applies to dismiss the action under r. 1(4), the court may either dismiss the action or deal with the defendant's application as if it were a summons for directions under r. 1(5).

We have therefore allowed the defendant's appeal with the result that the plaintiff's summons for directions was struck off. Costs here and in the courts below to the defendant.

Civil Appeal No A-03-54 Of 1997

This appeal concerns the defendant's application to dismiss the action under O. 25 r. 1(4). The courts below have dismissed the defendant's application. Hence the appeal by the defendant. As explained in the earlier appeal, the defendant's application to dismiss the action was made under O. 25 r. 1(4) after the plaintiff had failed to take out a summons for directions within time. It should have been heard and an order made on it under O. 25 r. 1(5). It should not have been dismissed in preference to making an order under the plaintiff's summons for directions which was not taken out within time. The appeal must therefore be allowed. However, in allowing the appeal by the defendant, we have to act under r. 1(5) since the courts below did not do so. Paragraph 5 of r. 1 in O. 25 of the RHC enables the court when considering the defendant's application to dismiss under para (4) either to dismiss the action on such terms as may be just or to deal with the application as if it were a summons for directions. In our judgment, as the plaintiff's action is quite unsustainable (see the first appeal above), it is futile and a waste of time to deal with the defendant's application as a summons for directions instead of dismissing the action. In the event, we are of the opinion that it is more appropriate, in the circumstances of the present case, to dismiss the action. This we did under r. 1(5).

The defendant's appeal was allowed with costs here and in the courts below.